JUL 2 1956
JOHN T. FEY, Clerk

IN THE

# Supreme Court

OF THE

# United States

---

**October Term, 1956**
**No. 221**

---

KANSAS CITY LIFE INSURANCE COMPANY
*Petitioner,*

vs.

LILLIAN SMITH MOULDEN, formerly LILLIAN M. SMITH
*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LAWRENCE A. LONG
*Long, Hyman & Smart*

INDEX


Preliminary Statement ..... 1
Jurisdiction ..... 2
Questions Presented for Review ..... 3
Statement of the Case ..... 4
Facts ..... 5
Argument ..... 9
Bergholm v. Peoria Life Ins. Co., 284 U. S. 489 .... 40
Bowen v. New York Life Ins. Co., 33 F. Supp. 705 .. 14
Broadway Laundry Co. v. New York Life Ins. Co., 351 Mo. 278, 172, S.W.2d 851 ..... 22
Business Men's Assur. Co. v. Davies, 106 Colo. 51, 101 P.2d 432 ..... 28
Cooney v. Cooper, 143 F.2d 312 ..... 30
Des Moines Life Ass'n. v. Owen, 10 Colo. App. 131, 50 P.2d 210 ..... 16
Erie v. New York Life Ins. Co., 104 F.2d 498 ..... 30
Erie Railroad Co. v. Thompkins, 304 U.S. 64 ..... 15, 16, 18, 22, 27, 31
44 A.L.R.2d 472 ..... 20, 21
Gossard v. Gossard, 149 F.2d 111 ..... 16
Hill v. Capitol Life Ins. Co., 91 Colo. 300, 14 P.2d 1006 ..... 9
Huddleston v. Dwyer, 322 U.S. 232 ..... 31
Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452 ..... 40
Jacobs v. Omaha Life Ass'n. 146 Mo. 523, 48 S.W. 462 ..... 14
Janeway v. Artusse, 159 F.2d 261 ..... 31
Johnson v. Metropolitan Life Ins. Co., 107 Mont. 133, 83 P.2d 922 ..... 29
Kansas City Life Ins. Co. v. Hislip, 154 Okla. 42 6 P.2d 678 ..... 11
Kansas City Life Ins. Co. v. White, 33 Ariz. 303 264 Pac. 474 ..... 12
Klaxon Co. v. Stentor Co., 313 U.S. 487 ..... 16, 22
Klein v. Insurance Co., 104 U.S. 88 ..... 37, 40

Wm. J. Lemp Brewing Co. v. Ems Brewing Co., 164 F.2d 290 ..... 16
MacGregor v. State Mut'l Co., 315 U.S. 280 ..... 31
Meredith v. Broad of Public Instruction, 112 F.2d 914 ..... 30
Metropolitan Life Ins. Co. v. Calvin, 96 F.2d 66 .... 17
Moulden v. Kansas City Life Ins. Co., 139 F.Supp. 904 ..... 1, 4, 12
Mutual Life Ins. Co. v. Reid, 21 Colo. App. 143, 121 Pac. 132 ..... 9
Mutual Life Ins. Co. v. Cunningham, 87 F.2d 842 .. 31
National City Bank v. Missouri State Life Ins. Co., 332 Mo. 182, 57 S.W. 2d 1066 ..... 22
New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414 ..... 30
New York Life Ins. Co. v. Jackson, 98 F.2d 950 ..... 11, 30
New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899 ..... 10
New York Life Ins. Co. v. Statham, 93 U.S. 24 ..... 34, 40
New York Life Ins. Co. v. Tolbert 55 F.2d 10 ..... 22, 23
Pilot Life Ins. Co. v. Owen, 31 F.2d 862 ..... 40
Prange v. International Life Ins. Co. 329 Mo. 651, 46 S.W. 2d 523 ..... 22
Ruhlin v. New York Life Ins. Co., 304 U.S. 202 .... 27
Ruhlin v. New York Life Ins. Co., 106 F.2d 921 .... 17
Seaboard Mut'l. Cas. Co. v. Profit, 108 F.2d 597 ... 31
Shinall v. Prudential Life Ins. Co., 91 Colo. 194, 14 P.2d 183 ..... 23, 25, 28, 32
Shira v. New York Life Ins. Co. 90 F.2d 953 ..... 22
Tabler v. General American Life Ins. Co., 342 Mo. 726, 117 S.W. 2d. 278 ..... 22
Terry v. New York Life Ins. Co., 104 F.2d 498 21 A.L.R.2d 249 ..... 11, 22
Versluis v. Town of Haskell, 154 F.2d 935 ..... 31
Wastun v. Lincoln Nat'l. Life Ins. Co., 12 F.2d 422. 17

IN THE

# Supreme Court of the United States

| | |
|---|---|
| KANSAS CITY LIFE INSURANCE COMPANY,<br>*Petitioner,*<br>vs.<br>LILLIAN SMITH MOULDEN, formerly LILLIAN M. SMITH,<br>*Respondent.* | No. |

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Kansas City Life Insurance Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit, rendered on April 7, 1956, which affirmed a judgment of the United States District Court for the District of Colorado rendering judgment for the plaintiff below on a Motion for Summary Judgment.

## PRELIMINARY STATEMENT.

This is an appeal from a decision of the United States District Court for the District of Colorado contained in a memorandum opinion entered July 14, 1955, reported as *Moulden v. Kansas City Life Insurance Company*, 139 F. Supp. 904 (D. Colo. 1955), as affirmed

by the Court of Appeals for the Tenth Circuit in a memorandum opinion not yet reported. Pursuant to Rule 23 (1) (a) and (b) the Petitioner has appended a certified copy of the opinion in the Court of Appeals. The opinion of the District Court is included in the transcript of record, nine copies of which are appended to this petition pursuant to Rule 23 (1) (i).

Jurisdiction of this Court is invoked upon the grounds set forth in Rule 19 that (1) the Court of Appeals has decided an important state question in a way in conflict with applicable state law, (2) the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and (3) the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the lower court as to call for an exercise of this Court's power of supervision.

The date of the judgment by the Court of Appeals sought to be reviewed is April 7, 1956, and the time of its entry is April 7, 1956.

Petitioner's request for rehearing was denied by order of the Court of Appeals dated May 7, 1956. On May 21, 1956 that Court granted a stay of mandate until June 20, 1956, pending application to this Court for a Writ of Certiorari. The stay of mandate was extended until July 7, 1956, by order dated June 18, 1956.

## JURISDICTION.

This Court has been granted jurisdiction to review the judgment in question by Writ of Certiorari by specific statutory provision found in 28 U.S.C. Sec. 1254 (1) (1952), Vol. 3, p. 4182.

## QUESTIONS PRESENTED FOR REVIEW.

1. Where the entire case, including the crucial issue whether Colorado or Missouri Law governed, turned on whether a promissory note constituted "payment", for an insurance premium where so accepted and treated, and Colorado case law clearly established the general rule that such a note does constitute payment, could the Federal Court in a diversity action brought in the District of Colorado, decline to follow that Colorado general rule by applying a distinction never passed upon by the Colorado Courts, and in direct conflict with prior holdings of neighboring states construing substantially identical provisions of the same company's policies?

2. Where Colorado case law plainly established the conflict of laws rule that the terms of a contract are to be interpreted according to the law of the place where the contract is made, and it was contended without opposition throughout the litigation that the contract in suit was made in Missouri, was it proper for the Federal Court in a diversity action heard in the District of Colorado to assume without citation, opposition or discussion that the policy was a Colorado contract governed by Colorado law?

3. Where a decision of the Court of Appeals for the Tenth Circuit took one position on a disputed question of Colorado law, and analogous but easily distinguishable decisions of the Colorado Supreme Court indicated an opposite attitude toward that question when raised in materially different fact situations, was the Federal Court in a diversity action laid in the District of Colorado free to distinguish the Colorado authorities and follow the rule of its own Court of Appeals?

4. Where the policy by its terms provided coverage only until a specifically stated date unless further premiums were paid on or before that date, was a Federal Court empowered by any inherent equity powers to extend the company's obligation and risk beyond the stated date without an extreme departure from the accepted and usual course of judicial proceedings?

## STATEMENT OF THE CASE.

This is an action to recover the proceeds of a life insurance policy. The insurance company, Petitioner here, defends claiming that the policy contract terminated prior to the death of the insured. The Respondent here, a citizen and resident of the State of Colorado, initiated the suit as plaintiff in the District Court in and for the County of Routt, State of Colorado, asking relief in the amount of $5,000.00 exclusive of interest and costs. Petitioner-defendant is a corporation organized under and existing by virtue of the laws of the State of Missouri and has its home office in Kansas City, Missouri. On petition of the defendant company, Petitioner here, the action was removed to the Federal District Court in and for the District of Colorado. Federal jurisdiction is based upon diversity of citizenship with an amount in controversy in excess of $3,000.00, exclusive of interest and costs. All facts were stipulated and neither party asked for trial by jury. On July 14, 1955, the trial court entered its memorandum opinion and order on motion for summary judgment, finding generally for the plaintiff below, Respondent here. *Moulden v. Kansas City Life Insurance Company*, 139 F. Supp. 904 (D. Colo. 1955). By memorandum opinion filed April 7, 1956, and as yet unreported, the Court of Appeals for the Tenth Circuit affirmed, adopting the trial court opinion.

## FACTS.

So far as material to the instant petition the facts are:

On September 30, 1948, Norman N. Smith, deceased former husband of the Respondent, made application to one Morton Howard, an authorized agent of the petitioner company, for a five year term life insurance policy. At the time of making this application the applicant gave to the agent, Howard, a promissory note executed by the applicant in the amount of $50.50, dated September 30, 1948, and drawn payable to the order of the agent. The cost of the initial policy premium was $50.50.

The application for insurance was accepted and approved by Petitioner company on October 27, 1948, and the policy in suit was issued on that date. Later that day, October 27, 1948, the policy was registered with the State of Missouri, Division of Insurance, Department of Business and Administration.

On the following day, October 28, 1948, the policy was mailed by Petitioner company to its general agent for the State of Colorado. That same day credit was entered on the premium record card of Petitioner company giving the applicant credit for payment of the full first premium of $50.50, and extending the policy's coverage to October 27, 1949.

On November 11, 1948, agent Howard delivered the policy to the insured, and obtained a receipt for it. At the time the policy was delivered the agent returned to the insured his promissory note and received in exchange a check made payable to the Kansas City Life Insurance Company in the amount of $50.50. The check was dated November 11, 1948, and was paid one week later.

No further premiums were paid upon the policy. The insured, Norman N. Smith, died on December 11, 1949.

As stated in the opinion of the District Court, (Trial T. R. pp. 17, 18) the policy and the application, which together constitute the entire contract between the parties, contain the following applicable provisions:

> "When Effective. This Policy shall take effect only during the lifetime and good health of the insured either (a) upon delivery to the Applicant and payment of the first premium hereon, or (b) on the day the application for this policy is approved at the Home Office of the Company on the plan, amount and premium rate applied for if the first premium in full in cash has accompanied said application.
>
> "If this application is accompanied by the first premium in full in cash, it is agreed that the Company assumes no liabiiity whatever unless and until this application is approved at the Home Office . . . for a policy on the plan, amount and premium rate applied for while the applicant is still alive and in good health, after which the insurance shall be effective, subject to the terms and conditions of the policy, on the day this application is approved at the Home Office of the Company.
>
> "If this application is not accompanied by the first premium in full in cash it is agreed that the Company assumes no liability whatever until a policy of insurance is actually delivered to me during my lifetime and while I am in good health, and any money, check, note, obligation or other thing of value, given to the Company or its agent, on account of the first premium on the policy applied

for shall be held by the Company merely as a deposit and not as payment until such time as the policy of insurance is issued and delivered to me during my lifetime and while I am in good health, after which the same shall be applied on such first premium charge, otherwise said deposit shall be returned to me or my heirs, executors or administrators.

"This Policy is issued in consideration of the stipulations, agreements and representations made in the application for this Policy, a copy of which application is attached hereto and made a part hereof, and said Policy and application constitute the entire contract between the parties hereto, and in further consideration of the payment of the first premium of Fifty Dollars and Fifty Cents, which is the premium for insurance hereunder ending on the twenty-seventh day of October, 1949. This Policy will be continued upon the further payment of a premium of like amount hereafter until the Fifth anniversary of this Policy or until the prior death of the insured." (Trial T. R. pp. 17, 18; 139 F. Supp. at 905).

Further the policy, which was wholly incorporated by reference in both the Complaint and the Stipulation of Facts (Trial T. R. pp. 4, 10), required all premiums to be paid in advance, but allowed a "grace period of thirty-one days from the due date of such premium, during which grace period this policy will remain in force." (Policy, p. 3, General Provision "2nd").

Regarding the effect of failure to make timely payment of premiums, the policy provided:

"The payment of any premium hereon shall not maintain this Policy in force beyond the date when the next premium becomes due. Upon failure to

> pay any premium on or before the date when due, or within the grace period provided herein, or . . . on the date to which payment may have been extended by voluntary agreement of the Company in writing executed at its Home Office . . . this Policy and each and every right and benefit hereunder shall immediately terminate, except the provisions hereof for reinstatement. (Policy, p. 3, General Provisions "3rd").

The central issue in the trial court was whether or not the policy was still in effect at the time the insured died. There the plaintiff claimed that the policy did not take effect until the date of its delivery to the insured, which act occurred in the State of Colorado. That view of the facts is based on the assumption that the contract was not completed until delivery in Colorado, and accordingly was a Colorado contract to be interpreted by Colorado law. The Petitioner company, however, contended that the policy by its terms was effective when approved at the home office because the promissory note was to be treated as cash payment. Thus the ultimate issue both for the purpose of determining when the policy became effective and for the purpose of determining whether its terms were to be interpreted according to the law of Colorado or of Missouri, is simply whether the promissory note is to be treated as the equivalent of cash payment for an insurance premium. The Petitioner company asserted and still asserts that the policy was completed in Missouri, and thus is a Missouri contract to be interpreted according to Missouri law. Furthermore, the Petitioner company contended, and still contends, that even if the policy did not become effective until delivered in Colorado, its clear, unambiguous provisions concerning: (1) premium due date, (2) the date when the period of coverage terminated, and (3) the condition of termina-

tion for non-payment of premium, govern those terms of the contract without regard to when the policy became effective.

As above stated, the trial court ruled generally against the Respondent company, and the Court of Appeals affirmed.

## ARGUMENT

* * *

QUESTION I: Where the entire case, including the crucial issue whether Colorado or Missouri law governed, turned on whether a promissory note constituted "payment" for an insurance premium, where so accepted and treated, and Colorado case law clearly established the general rule that such a note does constitute payment, could the Federal Court in a diversity action brought in the District of Colorado, decline to follow that Colorado general rule by applying a distinction never passed upon by the Colorado Courts, and in direct conflict with prior holdings of neighboring states construing substantially identical provisions of the same company's policies?

ARGUMENT: The Court of Appeals in affirming the District Court has decided an important question of Colorado law in a manner in conflict with applicable decisions of the Colorado Supreme Court. In repeated authoritative decisions the Colorado Court has established beyond question the general rule that a promissory note given in lieu of cash payment for the initial premium on an insurance policy is treated by Colorado law as the equivalent of cash. *Hill v. Capitol Life Insurance Company*, 91 Colo. 300, 14 P. 2d 1006 (1932). Furthermore, this rule has been enforced where, as in the instant case, the note is made payable to and delivered to the soliciting agent rather than to the company. *Mutual Life Ins. Co. v. Reid*, 21 Colo. App.

143, 121 Pac. 132 (1912). No Colorado authority has ever declared any exceptions to this general rule that a note constitutes payment, and no authority whatever was cited by the trial court in creating the exception applied below.

The Colorado rule that a promissory note constitutes the equivalent of a cash payment for a life insurance premium when accepted as such was early established in the case of *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899 (1911). There, as in the instant case, an applicant for insurance gave to the company's local soliciting agent the former's promissory note in the amount of the first year's premium. The agent transmitted the application and note to the company's Denver, Colorado, office, from which the application but not the note was sent to the home office. There as here, the application was accepted in the home office. The policy was issued and mailed to the company's Denver, Colorado, office. To make the *Pike* case even stronger in support of this Petitioner's contention here, the policy in that case was never delivered to the insured. Furthermore, the defendant company in the *Pike* case contended its policy was not effective as a binding contract until delivered to the insured. In reply to that contention the Supreme Court of Colorado stated: "The contract was complete when the application was accepted and the acceptance signified by mailing the policy." *Id.* at 249, 117 Pac. at 903. In the present case Petitioner seeks consistent application of this rule. It should not be applied only when its enforcement will defeat insurers in their legitimate contract expectations.

In the instant case, if the insured had died prior to delivery of the policy, this petitioner would have been bound under the *Pike* case to pay on the ground that

its policy took effect when accepted at the home office. It is fundamentally unfair for the federal court to so interpret Colorado law as to hold the company bound when the opposite circumstances occur. The manifest injustice and unsoundness of this decision may be illustrated by comparing the result in the instant case with that in a similar case involving the same company's policy, where this company's contention was substantially identical to that of the Respondent in this case. Thus in *Kansas City Life Ins. Co. v. Hislip*, 154 Okla. 42, 6 P. 2d 678 (1932) this company contended that the giving of a promissory note with part payment in cash for the first premium did not constitute "payment" of that premium. The Oklahoma Supreme Court held that the promissory note was to be treated as cash and the premium considered paid. It is a fair assumption that in the absence of a square holding involving identical policy provisions, the Supreme Court of Colorado would look to the decisions of its adjacent sister states in determining whether a note should be considered as payment under policies such as that involved here.

Admittedly there is no Colorado authority precisely in point in the sense of a case involving substantially identical terms in both the application and the policy. In that situation it was the duty of the trial court to consult the general law as evidenced by decisions of sister states, giving a particularly persuasive effect to opinions of states whose geographical, economic and political circumstances most nearly resemble those in Colorado. *Terry v. New York Life Ins. Co.*, 104 F.2d 498 (8th Cir. 1939); *New York Life Ins. Co. v. Jackson*, 98 F.2d 950 (7th Cir. 1938). Without reference to any authority in support of its position, the trial court ruled that the note given in the instant case did not operate as payment of the first premium, because:

> "the parties by their contract, stated that the first premium must be paid in full 'in cash' in order for the policy to take effect when the company approves the plan. It specifically states that acceptance by defendant's agent of a promissory note will not constitute cash or payment in the first instance, but will act merely as a deposit until the policy is delivered to the insured." *Moulden v. Kansas City Life Ins. Co.*, 139 F. Supp. 904, 906 (D. Colo. 1956).

The Supreme Court of the neighboring State of Arizona has dealt squarely with the issue under discussion in a case involving a policy and application issued by this company in terms substantially identical to those in the application just quoted and the policy here involved. The facts in *Kansas City Life Ins. Co. v. White*, 33 Ariz. 303, 264 Pac. 474 (1928), were strikingly similar to those in suit. Indeed in that case the promissory note given the agent as payment for the first premium was not paid prior to the insured's death, and the policy was never delivered to the insured. There the company's contention was opposite to its position in this action, i.e. the company there contended that the policy was ineffective because the promissory note given the agent did not operate as payment and the policy had not been delivered. The company relied on a statement in the application form, substantially identical to that involved in the instant case, as follows:

> "If this application is not accompanied by the first premium in cash, it is agreed that the company assumes no liability whatever until a policy of insurance is actually delivered to me during my lifetime while I am in good health, and any money, check, note, obligation or other thing of value, given to the company or its agent, on account of

> the first premium on the policy applied for shall be held by the company merely as a deposit and not as payment until such time as the policy of insurance is issued and delivered to me during my lifetime and while I am in good health, after which the same shall be applied on such first premium charge; otherwise said deposit shall be returned to me or my heirs, executors, or administrators." (264 Pac. at 475).

The company's contention that this clause in the application was to be strictly interpreted as rendering the policy ineffective until delivery of the policy concurred with payment in cash, which contention is identical to that of the Respondent in the instant case, was flatly rejected by the Arizona Supreme Court. This opinion should be accorded great weight in determining how the Colorado Supreme Court would interpret the precise provisions involved here.

In the above cited *Hislip* case, the Oklahoma Supreme Court asserted:

> "It would be manifestly unfair to permit an insurance company to deny its liability, during the period it was holding the insured's note in case of loss or disability, on the theory that the medium of payment which it accepted was not in compliance with its policy, and thereby prevent the insured from getting nothing (sic); and, in the event of no loss or disability, to permit it to accept and collect the full amount on said note at the expiration of that period if no loss occurred, and when the insurance for which said premium was paid had never been in force." (6 P.2d at 684).

It is submitted that it would be equally unfair to permit an insured to treat his promissory note as pay-

ment when to do so would enable him to recover on the policy, but to treat it otherwise when the latter course prevents expiration of the policy according to its terms prior to the assured's death.

It is this petitioner's contention that the insurance policy in suit is a Missouri contract to be governed by Missouri law. Thus in the absence of Colorado authority squarely in point it is appropriate to consult Missouri authorities on the precise issue whether a promissory note delivered to a company's soliciting agent constitutes payment forthe first premium. In the leading case of *Jacobs v. Onaha Life Ass'n.*, 146 Mo. 523, 48 S.W. 462 (1898), the Supreme Court of Missouri dealt with that exact issue. The fact situation was nearly identical to the present case. There the insured, in applying for a policy gave his personal note payable to the soliciting agent individually. The policy, which was issued the following day, recited that it was given in consideration of paynent of the first premium in cash before its delivery. Further the policy contained a provision, "That the policy of insurance which may be issued under this application shall not be enforced until the first payment thereon shall have been made by me in cash to, and accepted by, the Secretary of the Omaha Life Association . . ." (48 S.W. at 466). The company contended that the transaction was not a cash transaction within the terms of the policy, but one upon credit, and therefore, the policy never did go into effect. However, the Missouri Court rejected that contention holding the company bound by the note as if it had been payment in cash. ThisMissouri rule was recognized by the Federal District Court sitting in Missouri in the case of *Bowen v. NewYork Life Ins. Co.*, 33 F. Supp. 705 (E.D. Mo. 1940).

It is submitted that in holding that a promissory

note so given and accepted in payment for the first premium did not constitute the equivalent of payment in cash, the District Court, and the Court of Appeals have decided an important question of local Colorado law in a way in conflict with the way that question would be decided today by the Supreme Court of Colorado. In thus deciding, the Federal Courts below have violated the rule of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938).

* * *

QUESTION II: Where Colorado case law plainly established the conflict of laws rule that the terms of a contract are to be interpreted according to the law of the place where the contract is made, and it was contended without opposition throughout the litigation that the contract in suit was made in Missouri, was it proper for the Federal Court in a diversity action heard in the District of Colorado to assume without citation or discussion that the policy was a Colorado contract governed by Colorado law?

ARGUMENT: The Federal District Court, and the Court of Appeals by affirming, without opinion or citation of authority have over-ruled the contention of this petitioner maintained consistently throughout the litigation that the insurance policy in suit was a contract made in Missouri and therefore its terms were to be interpreted according to the law of Missouri, rather than that of Colorado.

In thus erroneously ruling that the contract was made in Colorado and governed by Colorado law, neither court below cited a single case from Colorado or any other jurisdiction. Nor did the Respondent. At no time during the course of this litigation has the Respondent even mentioned this issue. Does this default constitute a confession of weakness? Is not the Re-

spondent's consistent silence tantamount to an admission that this Petitioner's argument is unassailable?

In assuming with neither citation of authority nor adequate discussion of the issue, that the policy was a Colorado contract governed by Colorado law, the court decided an important issue of local law contrary to the way that issue would be decided by the Colorado Supreme Court.

The case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), established the now axiomatic proposition that a Federal Court whose jurisdiction is based on diversity of citizenship is bound to follow not only the statutes but also the case law of the state in which it sits. Since the *Erie* case it has become established that a Federal Court faced with a conflict of laws question in a diversity case is bound to follow the conflict rules established by local law in the state where trial is held. *Klaxon Co. v. Stentor Co.*, 313 U. S. 487 (1941); *Wm. J. Lemp Brewing Co. v. Ems Brewing Co.*, 164 F.2d 290 (7th Cir. 1947); Annot., 21 A.L.R. 2d 249, 251 (1952). Thus the initial duty of the trial court, before assuming independently to characterize the policy as a Colorado contract, was to determine how the Colorado courts would characterize such a policy.

It has long been the rule in Colorado conflict of laws cases that the law of the place where a contract is made governs interpretation of that contract's terms. *Des Moines Life Ass'n v. Owen*, 10 Colo. App. 131, 134, 50 P.2d 210 (1897). The Court of Appeals for the Tenth Circuit has acknowledged this to be the rule in Colorado as recently as *Gossard v. Gossard*, 149 F.2d 111 (10th Cir. 1945).

The issue whether the insurance contract in suit was made in Colorado or Missouri turns on the question

above discussed whether the promissory note given to the soliciting agent in payment of the first premium was equivalent to payment in cash. As stated by the trial court,

> "the policy by its terms could only become effective in one of two ways, i.e., a) upon delivery to the applicant and payment of the first premium, or b) *on the day the application is approved at the Home Office of the defendent, if the first premium in full in cash has accompanied the application.*" (Trial T. R. pp. 19, para. 4, emphasis added).

As above stated, in determining the preliminary issue whether the note constituted payment the trial court was bound by Colorado decisions holding such a note equivalent to cash payment.

In the Federal Courts as elsewhere it has long been recognized that where payment of the first premium accompanies an application for an insurance policy and the application is approved at the home office of the insurance company, the contract is made in the state where that home office is located. The rationale is that the last act essential to completion of the contract is approval of the application, and that the place where that last act is performed determines the place where the contract is made. *Metropolitan Life Ins. Co. v. Calvin*, 96 F.2d 66 (2d Cir. 1938); *Wastun v. Lincoln Nat'l Life Ins. Co.*, 12 F.2d 422 (8th Cir. 1926). This rule is particularly applicable in the instant case because the policy specifically provided that it should take effect as a contract "on the day the application for this Policy is approved at the Home Office of the company on the plan, amount and premium rate applied for if the first premium in full in cash has accompanied said application." (Trial T. R. p. 17 para. 4); cf. *Ruhlin*

*v. New York Life Ins. Co.*, 106 F.2d 921, 923 (3rd Cir. 1939).

Characterization of the insurance policy as a Colorado contract governed by Colorado law was highly prejudicial if not fatal to the rights of this Petitioner. The purpose of the rule in *Erie Railroad Co. v. Tompkins* is to assure a litigant in an action brought in Federal Court on grounds of diversity of citizenship that the result of his case will not be substantially different than if it had been tried in state courts of the state where the Federal Court sits. If this action had been tried in any state court in Colorado, that court would have been bound by the Colorado conflict of laws rule that a contract is to be interpreted according to the law of the place where made. A Colorado state court would have looked to the law of Missouri to determine the meaning of the words used in the insurance policy here involved. Thus it is the law of Missouri which governs the salient issue whether this policy terminated at expiration of the grace period following the stated premium due date. In this connection it is important to note the policy in suit is a contract for *term* insurance only. Term insurance is a contract to assume a stated risk until a stated time. The policy in question specifically provides:

> "This Policy is Issued In Consideration of the stipulations, agreements and representations made in the application for this Policy . . . and in further consideration of the payment of the first premium of $50.50, which is the *premium for insurance hereunder ending on the 27th day of October, 1949.* This *Policy will be continued upon* the *further payment of a premium* of like amount *on or before the 27th day of each October hereafter* until the Fifth anniversary of this Policy or until

the prior death of the insured." (Trial T. R. p. 8, para. 1, emphasis added).

Further the policy provided a grace period in the following language:

> "All premiums on this Policy are due and payable in advance . . . and any such premium after the first which is not paid on or before the date it becomes due shall be in default from the date it becomes due, but payment thereof, without interest charge, may be made within a grace period of 31 days from the due date of such premium, during which grace period this Policy will remain in force." (Trial T. R. p. 6, last line, page 7).

The Petitioner contends that the above quoted policy provisions governing the term for which the company assumes the risk are clear and unambiguous, and therefore constitute the only evidence of the contract between the parties concerning the termination date. On the other hand, the Claimant-Respondent, asserts that there is a conflict between: (1) these provisions concerning termination and premium due date, and (2) the provisions of the policy concerning its effective date. It is the position of the Petitioner that the provisions just quoted have nothing to do with the date when the contract is to take effect, but rather define the time when the contract shall terminate in absence of timely payment of premiums. Provisions concerning effective date merely define what acts condition initial effectiveness of the policy. Once effective the policy remains in force until terminated under entirely separate provisions, those last above quoted. Term insurance is a contract to assume a stated risk until a stated time.

An excellent and very recent discussion of the pre-

cise point at issue is contained in Annot., Insurance—Effective Date, 44 A.L.R.2d 472 (1955).

The exact issue here in question is stated at the outset of that annotation as its subject. The annotation deals specifically with cases where the insurer denies coverage on the ground that the event insured against occurred after the policy had lapsed for non-payment of premiums. In the cases discussed, as in the instant case, the insured contended that the period of coverage should be calculated from the date of policy delivery on the ground the policy took effect only on delivery, and that so calculated the coverage extended beyond the date of loss. In summarizing the results of the myriad cases discussed, the annotation declares:

> "The contention that the later date should control is based upon the argument that the provisions as to effective date raise an ambiguity which should be resolved in favor of the insured. In determining whether such an ambiguity exists, the courts have, of course, considered the widely varying phraseology of the particular contracts with which they have been confronted, so that it would be unwise to formulate any categorical rule that an ambiguity is or is not presented in such a general situation. However, *in a large majority of the cases where* the *question has been considered*, it *has been held that the date stipulated in the policy* as that from which premiums are to be calculated *must be given effect, notwithstanding the provision that the coverage was not actually enforced until a later date.* This result has usually been based upon a finding that the language as to premium due dates is clear and definite, and that the advantages of having such an important date clearly established outweigh any considerations of

injustice in charging the insured for protection not actually afforded." (*Id.* at 475, emphasis added).

Even if Missouri law were not controlling in the instant case, it would be unreasonable for the Federal Court to assume that the Colorado Supreme Court would decline to follow the majority position just stated and take a minority view if faced with the precise question here at issue. Petitioner maintains, however, that Missouri law governs the contract at issue.

The Missouri courts apply the above majority reasoning with special force to cases involving term insurance such as that in the instant suit. The annotation just quoted recognized this special rule for term insurance by asserting: "the courts have sometimes drawn a distinction between ordinary insurance and term insurance, holding that in the policies of the latter type, where it is ordinarily specifically provided that coverage is purchased only to a specified date, there is no room for construction of the contract in favor of the insured." (Annot., Insurance—Effective Date, 44 A. L.R. 2d 474, 504, 1955). Term insurance contracts are thus excepted by courts which otherwise take the minority position that the date of actual delivery controls, because the guiding theory of cases giving pre-eminence to the date of delivery is that the insured should get a full year's coverage for a year's premium, and that rationale is not applicable to term insurance providing coverage only till a specified date. (*Id.* at 505) It is to be noted that the policy in the present suit provides coverage only to a definitely stated date. (Trial T.R. p. 8 para 1). In support of the last above quoted statement, the annotation sets out ten Missouri appellate cases. In the face of such overwhelming authority there can be no doubt that if the insurance contract in question was made in Missouri, it terminated for

failure to pay premiums prior to the death of the insured. *Broadway Laundry Co. v. New York Life Ins. Co.*, 351 Mo. 278, 172 S.W. 2d 851 (1943); *Tabler v. General American Life Ins. Co.*, 342 Mo. 726, 117 S.W. 2d 278 (1938); *National City Bank v. Missouri State Life Ins. Co.*, 332 Mo. 182, 57 S.W. 2d 1066 (1933); *Prange v. International Life Ins. Co.*, 329 Mo. 651, 46 S.W. 2d 523 (1931).

Until its decision in the instant matter, the Tenth Circuit consistently followed the rationale of the above cited Missouri cases that a policy stipulation of premium due date is controlling over the later actual date of delivery and payment of premium even where the effect of enforcing the stipulated due date is to cause lapse of the policy, or to require the insured to pay for the coverage provided by the first premium, a higher actual rate than if the first premium purchased a full year's insurance. *Shira v. New York Life Ins. Co.*, 90 F. 2d 953 (10th Cir. 1937); *New York Life Ins. Co. v. Tolbert*, 55 F. 2d 10 (10th Cir. 1932). The decision below in the present case represents a direct departure by the Tenth Circuit from its own prior decisions.

In so departing from its own precedent and in assuming the case to be governed by Colorado law rather than by Missouri law the Court of Appeals has not only decided an important state question in a way contradictory to applicable state law, but has also decided a grave federal question concerning the scope of the doctrine in *Erie Railroad Company v. Tomkins*, in a manner which directly conflicts with applicable decisions of this Supreme Court. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941); and cases cited in Annot. 21 A. L.R. 2d 249, 251 (1952).

* * *

QUESTION III: Where a decision of the Court of

Appeals for the Tenth Circuit took one position on a disputed question of Colorado law, and analogous but easily distinguishable decisions of the Colorado Supreme Court indicated an opposite attitude toward that question when raised in materially different fact situations, was the Federal Court in a diversity action laid in the District of Colorado free to distinguish the Colorado authorities and follow the rule of its own Court of Appeals?

ARGUMENT: The third issue turns on whether the trial court was free to follow a prior decision of its own Court of Appeals or was bound to follow a conflicting decision of the Colorado Supreme Court on dissimilar facts. The Petitioner contends that in holding that it was bound to follow the Colorado decision in *Shinall v. Prudential Life Ins. Co.*, 91 Colo. 194, 14 P.2d 183 (1932), the trial court erred not only in failing to recognize the contract as a Missouri contract not governed by Colorado law, but also in too broadly interpreting the scope of the *Erie* doctrine that federal courts in diversity actions must follow local decisions.

It is the position of the Petitioner that even if the policy involved was a Colorado contract governed by Colorado law, the trial court would have been free to follow clear federal precedent in its own circuit established in the case of *New York Life Ins. Co. v. Tolbert*, 55 F.2d 10 (10th Cir. 1932). There the facts indicated that the insured, Tolbert, on August 14, 1928, applied for insurance using a company form which stipulated that it should not take effect, "unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime." (*Id.* at 11).

The *Tolbert* policy was issued, dated and executed on August 23, 1928, and contained the following pro-

vision which is nearly identical in terms to the consideration clause of the policy at issue:

> "This contract is made in consideration of the application therefor and of the payment in advance of the sum of $363.00, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the 23rd day of August, 1929, and of a like sum on said date and every Twelve calendar months thereafter during the life of the insured . . . .
>
> "This Policy takes effect as of the 23rd day of August, 1928, which day is the anniversary of the Policy." (*Ibid.*)

Again, as in the present case, the *Tolbert* policy provided a one month grace period and stipulated that except for the grace period no premium would maintain the policy in force beyond the time the following payment should come due. The policy was sent by the company to the soliciting agent, and he delivered it to the insured on September 1, 1928, at which time the first premium was paid. The insured Tolbert died on a day which fell after expiration of the grace period if the contract was to be enforced according to the stated premium due date, but within the grace period if the premium due date were considered to be the anniversary of the day when the policy was actually delivered and paid for. The Court of Appeals for the Tenth Circuit held:

> "In our opinion, the premium due date was August 23, because the policy expressly provided that the insurance was made in consideration of the first premium carrying the policy until August 23, 1929, and of a like sum on said date each year

thereafter, and, further, that August 23, was the anniversary of the policy. True, the application recited that the insurance should not take effect unless the policy should be delivered and received by the applicant and the first premium should be paid. And counsel for appellee, insisting that there is a conflict in these provisions, invoked the settled rule, where there is ambiguity in an insurance contract it should be resolved in favor of the assured. But there was no such conflict of agreement with regard to the due date of the premiums and the anniversary of the policy. The policy fixed those dates and the application merely annexed a condition precedent to the liability of the insurance company and not to the existence of the policy." (*Id.* at 12).

In *Tolbert* it was contended that Colorado law required a holding that the policy was in force at the death of the insured and that contention, which is identical to the contention of Respondent here, was flatly rejected. (*Id.* at 13).

The really significant facts of the *Tolbert* case which identify it with the case in suit are that both cases involved *term* insurance and both policies specified a premium due date which date coincided with the end of the term for which each premium purchased coverage.

In the instant case the trial court declined to follow the *Tolbert* precedent for the stated reason that it was bound by the decision of the Colorado Supreme Court in *Shinall v. Prudential Life Ins. Co.*, 91 Colo. 194, 14 P.2d 183 (1932). The Petitioner submits that the *Shinall* case is not binding as a declaration of Colorado law applicable to the facts of this case for the following reasons:

1. The *Shinall* opinion itself emphatically declares that the result there is conditioned upon the peculiar facts and circumstances of that case. The Colorado court could not have more powerfully expressed the intent to set no precedent for cases not involving identical facts, or identical policy provisions, and the instant case is plainly distinguishable on the facts. (*Id.* at 201, 14 P.2d at 186).

2. The *Shinall* case involved a policy of endowment insurance, and the rule regarding interpretation of termination provisions is different for cases involving *term* insurance, as in the instant situation.

3. The *Shinall* case turned on a finding that the policy contained inconsistent conflicting provisions rendering its meaning ambiguous, (*Id.* at 196, 14 P.2d at 185) whereas in the instant case the policy provisions are clear and unambiguous.

4. In the *Shinall* case the policy stipulated for an "annual premium" and the court inferred that by stating an "annual premium" the parties intended that each premium including the first should provide a full year's coverage. (*Id.* at 196, 14 P.2d at 184). However, the policy here involved makes absolutely no mention of a first annual premium. Rather it plainly states that it is issued in consideration of the "payment of the *first premium* of $50.50, which is the *premium for insurance hereunder ending on the 27th day of October, 1949.*" (Trial T.R. p. 8 para. 1, emphasis supplied).

5. In the *Shinall* case the policy provided that it should take effect, under the facts as they occurred there, only upon delivery of the policy and payment of the premium. (91 Colo. at 195, 14 P.2d at 184). In the instant policy however, there is an alternative pro-

vision for effective date in case the first premium payment accompanied the application, in which case the policy took effect upon its issuance at the home office. (Trial T.R. p. 6, last full para.) Petitioner asserts that the policy took effect at the time of issuance.

The issue then is whether the Colorado *Shinall* case constituted binding precedent, or whether the federal courts should have followed their own precedent set in the *Tolbert* case. It has never been seriously contended that the doctrine of *Erie Railroad Co. v. Tompkins*, binds a federal court in a diversity action to follow a state precedent which the courts of that state would not be bound to follow. The *Erie* doctrine has always been considered limited by the historical restrictions of the rule of stare decisis upon which the entire case law system is founded. This Court has emphasized in *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 209 (1938), that application of the *Erie* rule is limited to, "an identical action in the State Courts." In the *Shinall* case the result turned on interpretation of the particular policy provisions there before the Colorado Court. That case cannot be linked to the present case as "an identical action;" for the *Shinall* case involved wholly dissimilar facts and policy provisions.

The *Shinall* opinion itself carefully limited its value as a precedent, and indicated the clear intent of the Colorado court to reserve complete freedom to interpret all subsequent insurance policies according to the words used in the policy provisions involved. In the *Shinall* case, the Colorado court stated:

> "*This decision*, as always, *is limited to the facts of this case*. But as an additional precaution we say *it does not contemplate cases where the premium was paid at the time of the application and the*

> *policy was not antedated*, where the application was not made a part of the policy, where the parties themselves have interpreted an otherwise obscure or conflicting contract, where waiver or estoppel have intervened, *where there was an unambiguous contract to pay a year's premium for less than a year's protection*, or where there was a special consideration for antedating the policy. No such case is before us." *Shinall v. Prudential Life Ins. Co.*, 91 Cdo. 194, 201, 14 P.2d 183, 186 (1932 emphasis added).

It is submitted that the present case falls squarely within the italicized portions of the last quoted paragraph.

The declared intention of the Colorado court to confine the *Shinall* case to its specific facts was demonstrated years later in the case of *Business Men's Assur. Co. v. Davies*, 106 Colo. 51, 101 P.2d 432 (1940). In *Davies* the policy provision governing its effective date stated:

> "If the first premium shall have been paid in exchange for the binding receipt of the Company upon making application herefor, this policy shall be effective as provided in the binding receipt; otherwise this policy shall not take effect until it has been both delivered to the assured and the first premium paid during the lifetime and good health of the assured.' (*Id*, at 55, 101 P.2d at 434).

The quoted provision is substantially identical to the effective date provision in the policy at suit, and furthermore, the *Davies* policy provided a thirty-one day grace period as did the policy here involved. Although the *Davies* policy was not effectively delivered until September 27, 1924, it recited a premium due date of

September 6. The issue, as in the instant case, was whether the assured had died within the stipulated grace period, and whether the policy's clear statement of premium due date from which the grace period should be calculated was to be strictly construed. The assured by correspondence and several premium payments indicated his acceptance of this due date stated in the policy. It was held by the Colorado Supreme Court there was no conflict in the two provisions regarding effectiveness and due date, and therefore there was no ambiguity to be resolved against the company.

The Supreme Court of Montana, a state geographically, economically, and politically similar to Colorado, recognized that the really significant factor in the *Shinall* case was the Colorado court's finding that the parties had bargained for one year's full coverage in exchange for the first premium. Thus the Montana court, in discussing the *Shinall* case stated that the: "Court based its decision upon the fact that an ambiguity existed in a recital as to the annual premiums, and the insured should have gotten one year's coverage for the first payment." *Johnson v. Metropolitan Life Ins. Co.*, 107 Mont. 133, 83 P.2d 922, 925 (1938). Further the Montana court astutely recognized and credited the Colorado Supreme Court's stated restriction on the rule laid down in *Shinall*, that: "As an additional precaution we say it *does not contemplate cases where . . . there was an unambiguous contract to pay a year's premium for less than a year's protection.*" (*Id.* at 925, emphasis added). It is submitted that in the instant case there was no ambiguity whatever.

Because the *Shinall* case was clearly distinguishable from the case at bar, the federal courts below were by no means bound by the *Shinall* decision, but were free to follow their own precedent in the *Tolbert* case. In

absence of a clearly controlling state decision squarely in point, the Court of Appeals should give great weight to its own prior decision. *Cooney v. Cooper*, 143 F.2d 312 (8th Cir. 1944). Even if the Colorado court in deciding the *Shinall* case had purported to lay down a rule for future cases, which it expressly disclaimed doing, a federal court is never bound by mere dicta stated in prior opinions of state courts. *New England Mut. Life Ins. Co. v. Mitchell*, 118 F.2d 414 (4th Cir. 1940). In the latter case it was stated:

> "The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise." (*Id.* at 420)

The federal courts recognize that each insurance policy is a separate contract. Any change in terms can completely alter the legal effect of a policy. Where particular words used in a life insurance policy have never been construed by a state court whose rules apply, the federal courts are duty bound to analyze the particular policy provisions at issue in light of the law as declared in other jurisdictions. *Erie v. New York Life Ins. Co.*, 104 F.2d 498 (8th Cir. 1939); *New York Life Ins. Co. v. Jackson*, 98 F.2d 950 (7th Cir. 1938); cf. *Meredith v. Board of Public Instruction*, 112 F.2d 914 (5th Cir. 1940).

Moreover when the rule of state decision law is

not clear, the federal courts are bound by the last declared version of that state law, and will give greater weight to later decisions. *Huddleston v. Dwyer*, 322 U. S. 232 (1944); *Mutual Life Ins. Co. v. Cunningham*, 87 F. 2d 842 (8th Cir. 1937). This principle has been recently applied by the Court of Appeals for the Tenth Circuit in *Janeway v. Artusse*, 159 F. 2d 261 (10th Cir. 1947); *Versluis v. Town of Haskell*, 154 F. 2d 935 (10th Cir. 1946).

As a general practice when there is no controlling decision in the state courts, a federal court of appeals will apply the rules supported by the weight of authority in sister states. *Seaboard Mut'l Cas. Co. v. Profit*, 108 F. 2d 597 (4th Cir. 1940). As stated above it is the majority rule that clear unambiguous policy provisions concerning premium due date are to be respected. Annot., 44 A.L.R. 2d 472, 475, 477 (1955). In the alternative it has been said that in absence of binding authority from the Colorado courts, the rule declared by the federal court of appeals which includes Colorado should not be disturbed. *MacGregor v. State Mut'l Co.*, 315 U. S. 280 (1942). It is submitted that if the federal courts below had followed either the majority rule or their own prior decision in the tenth circuit *Tolbert* case above discussed this Petitioner would have prevailed. Disregarding both their own precedent and the majority rule in the United States, the courts below followed the Colorado *Shinall* case in a way and to an extent that the Colorado courts themselves would not have followed that case. Such a stringent, strained application of the *Erie Railroad Co. v. Tompkins* rule not only violated the spirit and the meaning of that rule but also stretched to new lengths the principal of stare decisis, all in conflict with the express declaration of the Colorado Court in the

*Shinall* case which these federal courts purported to follow. *Shinall v. Prudential Life Ins. Co.*, 91 Colo. 194, 201, 14 P. 2d 183 (1932). It is submitted that in so applying the Erie rule the District Court and Court of Appeals have decided a federal question in a way which conflicts with applicable decisions of this Supreme Court, and that in its failure to correct the error of the District Court, the Court of Appeals has so far sanctioned a departure from accepted and usual course of judicial proceedings by the lower court as to call for an exercise of this Court's power of supervision.

* * *

QUESTION IV: Where the policy by its terms provided coverage only until a specifically stated date unless further premiums were paid on or before that date, was a federal court empowered by any inherent equity powers to extend the company's obligation and risk beyond the stated date without an extreme departure from the accepted and usual course of judicial proceedings?

ARGUMENT: The policy which forms the basis for this action provided specifically:

> "All premiums on this Policy are due and payable in advance . . . and any such premium after the first which is not paid on or before the date it becomes due shall be in default from the date it becomes due, but payment thereof, without interest charged, may be made within a grace period of 31 days from the due date of such premium . . . ." (Trial T.R. p. 6, last line, 7).

The policy further provided:

> "This Policy Is Issued In Consideration of the stipulations, agreements and representations

made in the application for this Policy . . . and said Policy and application constitute the entire contract between parties hereto, and in further consideration of the payment of the first premium of Fifty Dollars and Fifty Cents, which is the premium *for insurance hereunder ending on the 27th day of October, 1949.* This Policy will be continued upon the further payment of a premium of like amount on or before the 27th day of each October hereafter until the Fifth anniversary of this Policy or until the prior death of the Insured." (Trial T.R. p. 8, para. 1, emphasis added).

Furthermore the policy clearly stated conditions under which coverage would terminate and the policy would be forfeited as follows:

"The payment of any premium hereon shall not maintain this Policy in force beyond the date when the next premium becomes due. Upon failure to pay any premium on or before the date when due, or within the grace period provided herein, or upon failure to pay any premium, or part thereof, on the date to which payment may have been extended by voluntary agreement of the Company in writing executed at its Home Office by the President, Vice-President, Secretary or Assistant Secretary, *this Policy and each and every right and benefit hereunder shall immediately terminate,* except the provisions hereof for reinstatement." (Policy General Provision "3rd," emphasis added).

The entire policy was incorporated by reference into the stipulation of facts and the complaint in the District Court, and is hereto appended.

It is unquestionable that if the policy contract is to be enforced according to its terms, its coverage

lapsed at the end of the grace period calculated from the stated premium due date. The effect of the decision of the District Court, as affirmed by the Court of Appeals, is to exercise general equity powers to prevent a forfeiture according to the terms of the policy. Petitioner contends that the Federal District Court had no such extensive equity powers. Its attempted extension of the policy coverage beyond the date stipulated in the agreement of the parties, constituted an unreasonable and arbitrary interference with the freedom of contract.

Morever the grave danger latent in the lower court's decision if allowed to stand is that it casts serious doubt upon the legal effect henceforth to be accorded to provisions regarding termination in life insurance contracts generally. Prior to this case policy termination provisions have been enforced with due deference to the plain words used. The danger is substantial. The insurance business in the United States is so extensive and so important to the financial stability of our economic system, that any encroachment upon the proven theory of operation constitutes a serious threat to the stability of it and every other industry in which life insurance funds are invested.

The entire insurance business is one founded upon ability to predict future risks with reasonable certainty. Any judicial interference which will materially vary the risks estimated by insurance companies in assessing their premium rates so as to increase the risks beyond those expressly bargained for and on which premium rates were computed, constitutes a direct attack upon the very foundations of the insurance business. In *New York Life Ins. Co. v. Statham*, 93 U. S. 24 (1876), this Court demonstrated a profound understanding of the essential nature of the life

insurance business. In the Statham case claimants on several life insurance policies sought the intervention of equity to prevent forfeiture of those policies on the ground that the admitted non-payment of premiums was excused because payment had become impossible during the Civil War. The persons insured had been residents of Confederate States, whereas the insurance companies involved were domiciled in Northern states loyal to the Union. Declining to exercise any equitable powers to prevent forfeiture the Supreme Court stated:

> "(I)t must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. . . . The insured parties are associates in a great scheme. . . . Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the under-

standing and the practice in this department of business. . . .

"The case, therefore, is one in which time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence." (*Id.* at 30, 31).

The court continued:

"In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Any thing that interferes with it deranges the security of the business. If every policy lapsed . . . should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of bad cases, whilst the company necessarily lose the

cases which are desirable, would be manifestly unjust. . . . The nature of the business, as a whole, must be looked at to understand the general equities of the parties." (*Id.* at 32, 33).

In the later case of *Klein v. Insurance Co.*, 104 U. S. 88 (1881), this Court had occasion to reconsider, and it affirmed the policy declared in the *Statham* case. In the *Klein* case it appeared that the assured died only seventeen days after the due date of a premium which had not been paid. The claimant proved that prior to the death of the insured, who had taken out the policy himself, she had no notice or knowledge of its terms. Furthermore, the assured himself for twenty days prior to the premium due date, and from that date until his death, had been mentally deranged and incapable of attending to any business matter. For that reason alone the premium had not been timely paid. Therefore the claimant asked that this Court exercise general equitable powers to prevent forfeiture on the ground that the default in payment had been accidental. The company stood on the forfeiture clause and denied payment.

This Court, rejecting the assertion that its equitable powers were broad enough to justify writing an exception into the contract properly recognized the forfeiture provision as a practical, proper and necessary method by which insurance companies assure timely payment of premiums in order to provide definite bases upon which to predict costs of carrying risks. The Court stated:

"Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument,

and the penalty is deemed only as accessory." (*Id.* at 90).

Continuing, the court used language which could be aptly applied to the case at suit:

> "A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.
>
> "Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons." (*Id.* at 90, 91).

The indispensability of timely premium payment to the sound financial basis of the life insurance business was recognized when this court stated:

> "If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure

of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do." (*Id* at 91).

Where, as in the present case, the terms of the contract clearly define the risk undertaken by the insurance company and the premium due date is clearly and unequivocally stipulated without ambiguity, it is manifestly unjust to hold the insurance company to an obligation which it never intended to assume and did not assume. The effect of the decisions below in this case is to uproot and destroy the certainty of premium paying dates upon which the life insurance business is founded and to substitute in its stead uncertainty and indefiniteness of such dates dependent upon varying and uncertain dates of delivery of the policy, and in direct contradiction of definite and fixed provisions in the policy itself.

The decisions below in this case depended upon their finding that the contract provisions in suit were ambiguous. (Trial T.R. p. 21, para. 2, 3). It is difficult to detect any ambiguity in provisions which as clearly as those in suit state the premium due date and the condition that for non-payment of the premium upon that date or within the grace period thereafter the policy should be forfeited. (See policy, p. 3, General Provisions and Privileges, para. 3rd). In this regard this Court has stated in rejecting a contention similar to that urged by the Respondent here:

"It is true that where the terms of a policy are of doubtful meaning, that construction most favor-

able to the insured will be adopted. . . . (citing cases). This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.

"Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462-463. As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. Klein v. Insurance Co., 104 U.S. 88, 91; New York Life Ins. Co. v. Statham, 93 U. S. 24, 30-31; Pilot Life Ins. Co. v. Owen, 31 F. (2d) 862, 866. *And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy*, constituting a condition precedent to the granting of such relief by the insurer, *would be to vary the plain terms of a contract in utter disregard of long-settled principles.*" *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 492 (1932) (parentheses and emphasis added)

It is submitted that in so broadening its own powers to rewrite an insurance policy contract the Dis-

trict Court below has so far departed from the accepted and usual course of judicial proceedings, and the Court of Appeals has so far sanctioned that departure as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

LAWRENCE A. LONG.
*Long, Hyman & Smart*

Office - Supreme Court, U.S.
FILED
JUL 24 1956
JOHN T. FEY, Clerk

# Supreme Court of the United States

October Term 1956

No. 221

KANSAS CITY LIFE INSURANCE COMPANY,
Petitioner,

vs.

LILLIAN SMITH MOULDEN, formerly LILLIAN M. SMITH,
Respondent.

The following is an exact copy of the opinion of The United States Court of Appeals for the Tenth Circuit in this case:

---

# United States Court of Appeals

Tenth Circuit

March Term 1956

FILED
United States Court of Appeals
Tenth Circuit
April 7, 1956
Robert B. Cartwright, Clerk

KANSAS CITY LIFE INSURANCE COMPANY,
Appellant.

vs.

LILLIAN SMITH MOULDEN, formerly LILLIAN M. SMITH,
Appellee.

} Number 5248

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Thomas Smart for Appellant.

Paul A. Hentzell (Don Lorenz was with him on the brief) for Appellee.

Before MURRAH and PICKETT, Circuit Judges, and HILL, District Judge.

# Supreme Court of the United States

October Term 1956

No. 221

KANSAS CITY LIFE INSURANCE COMPANY,
Petitioner,

vs.

LILLIAN SMITH MOULDEN, formerly
LILLIAN M. SMITH,
Respondent.

The following is an exact copy of the opinion of The United States Court of Appeals for the Tenth Circuit in this case:

# United States Court of Appeals

Tenth Circuit

March Term 1956

FILED
United States Court of Appeals
Tenth Circuit
April 7, 1956
Robert B. Cartwright, Clerk

KANSAS CITY LIFE INSURANCE COMPANY,
Appellant.

vs.

LILLIAN SMITH MOULDEN, formerly LILLIAN M. SMITH,
Appellee.

Number 5248

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Before MURRAH and PICKETT, Circuit Judges, and HILL, District Judge.

PER CURIAM:

This is an appeal from a summary judgment holding appellant liable on its insurance policy issued on the life of Norman N. Smith, with his wife, appellee, as beneficiary. The question is whether the policy was in force on the death of the insured, December 11, 1949, and the answer turns on whether the policy became effective on October 27, 1948, the date of its approval and issuance in the home office, or November 11, 1948, when it was delivered to the insured by the writing agent.

On a stipulation of facts, the trial court held that the policy did not become effective until the date of delivery on November 11, 1948, and that the insured's death therefore occurred within the grace period of the policy. For the reasons stated in the trial court's opinion in . . . Fed. Supp. . . . . (decided July 14, 1955), the judgment is

*AFFIRMED.*

No. 221

JUL 27 1956
JOHN T. FEY, Cle

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

KANSAS CITY LIFE INSURANCE COMPANY,
*Petitioner,*

*vs.*

LILLIAN SMITH MOULDEN, formerly
LILLIAN M. SMITH,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

## MEMORANDUM BRIEF FOR RESPONDENT IN OPPOSITION

BENJAMIN F. STAPLETON, JR.,
PAUL A. HENTERLY,
DON LORENZ,
*Counsel for Respondent,*
420 Denver Club Building,
Denver 2, Colorado.

PEERLESS PRINTING CO., DENVER

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

## No. 221

KANSAS CITY LIFE INSURANCE COMPANY,
*Petitioner,*

*vs.*

LILLIAN SMITH MOULDEN, formerly
LILLIAN M. SMITH,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.**

## MEMORANDUM BRIEF FOR RESPONDENT IN OPPOSITION

TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Respondent, Lillian Smith Moulden, formerly Lillian M. Smith, respectfully prays that the Writ of Certiorari be denied for the following reasons:

Respondent adopts the statement of the case of Petitioner for the sake of brevity, but denies in general the argument of Petitioner.

This litigation involves merely a Contract of Insurance which is very binding and specific in detail and allowing no deviation from its terms. Petitioner's Contract of Insurance demanded "payment in cash" or "delivery of the policy to the insured" before becoming effective. In this case, no cash was paid and "delivery" became the control-

ling factor. By Petitioner's own Contract, the policy became effective on "Date of Delivery" and no sooner.

This case is of no importance to anyone other than the litigants themselves. The decision in both Courts below turned upon the unusual and peculiar set of facts which would occur rarely, if ever, again. Petitioner prepared the contract in question and is bound by its most specific terms. Petitioner cannot now ask this Honorable Court to alter the terms of its own Contract.

Further, there is no Federal Question involved in the litigation, nor any conflict in decisions between the various Circuits of the Court of Appeals on the question the Petitioner seeks this Honorable Court to review. Nor is there any conflict between the decision of the Courts below with any state law. The decision below merely applies the facts of the case to the Universal Principal of law that "A written instrument may not be altered, added to or enlarged at the mere whim of either party to said instrument." In examining the "When Effective" clause of the Contract, which appears on Page six (6) of Petitioner's Brief, one finds that it is unmistakably clear that without a cash payment, *delivery* controls this Contract of Insurance, as the Contract calls for cash or delivery, and as there was no cash payment to the agent, then the policy did not become effective until delivery on November 11, 1948, and was in effect on the date of the death of insured, December 11, 1949. Petitioner may not now say that because its Home Office recorded this policy of insurance at an earlier date, that it waived all other restrictive clauses in the Contract. The Policy, as written, is the controlling instrument.

For the reasons already set forth, Respondent respectfully believes that this litigation does not warrant review by this Honorable Court. This litigation involves strictly a contract question which was presented to the Court below for interpretation and determination upon the facts as presented to the trial court, and both Courts found for the Respondent in the same manner after careful and lengthy consideration. Certainly this Court need not concern itself with the mere interpretation of a Contract which would

affect only the parties to that Contract. In this case, the evidence was presented to the Courts below and carefully weighed. The Petitioner is merely asking this Honorable Court to review the adoption of the facts presented at the trial to a Contrad of Insurance prepared exclusively by the Petitioner. The District Court and the Court of Appeals affirmed the universal principal that "a written instrument may not be altered without the written consent of both parties."

One basic point upon which Petitioner relies, concerns the giving of a *Note* at the time the application was signed. Petitioner contends this was payment under the Contract and established the effective date. Had insured died between the date thenote was given and the date of *Delivery*, when a cash payment had not been made, as required by the Policy Contract itself, the Petitioner would have disaffirmed the Insurance Contract. The effect of giving a note to Petitioner, and all other questions, were carefully determined by the Courts below, and both Courts reached the same conclusion—The date of *Delivery*, in the absence of a cash payment, was the controlling factor and established the effective dateof the policy. It would be manifestly unfair to permit insurance companies to avoid their legal liabilities and responsibilities by an attempt to modify the terms of their own Contracts.

The District Court and the Court of Appeals did not depart from the accepted concept of law that a written instrument cannot be altered without the written consent of both parties.

For the foregoing reasons, it is respectfully submitted that this Petitionfor a Writ of Certiorari should be denied.

Respectfully submitted,

Benjamin F. Stapleton, Jr.,
Paul A. Hentzell,
Don Lorenz,
*Counsel for Respondent*,

420 Denver Club Building,
Denver 2, Colorado.